UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/52/357
17 September 1997

ORIGINAL: ENGLISH

Fifty-second session
Item 105 of the provisional agenda*

CRIME PREVENTION AND CRIMINAL JUSTICE

Letter dated 16 September 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General

I have the honour to transmit to you the draft of an international instrument against the smuggling of illegal migrants prepared by Austrian legal experts taking into account comments of various international organizations and legal experts of various countries.

The motives of this Austrian move are the following: the smuggling of illegal migrants, a particularly heinous form of transnational exploitation of individuals in distress, has considerably increased in recent times and poses a growing threat to the international community as a whole.

1. International cooperation in combating the smuggling of illegal migrants within the United Nations system is being promoted primarily by the Commission on Crime Prevention and Criminal Justice. The General Assembly requested the Commission to consider giving attention to the question of the smuggling of migrants at its sixth session in order to encourage international cooperation to address the problem within the framework of its mandate.

On the basis of information received by Member States, the Commission on Crime Prevention and Criminal Justice is in a position to consider "devising an effective approach that criminal justice systems might adopt to combat the illegal smuggling of migrants, for example, taking more compatible and better harmonized countermeasures, in terms of policy and practical operations, at the national, regional and international levels" (E/CN.15/1997/8, para. 44).

2. In their practical technical approach, the measures envisaged by the Commission will certainly further contribute to effectively combating the

* A/52/150 and Corr.1.

smuggling of illegal migrants. However, a legal analysis demonstrates the absence of an international instrument that would define the smuggling of illegal migrants as a transnational crime and would establish a treaty obligation for States to exercise their jurisdiction over persons committing and abetting such a crime or, as the case may be, providing for the extradition of the offender in response to a justified request by a concerned State and to cooperate in this exercise.

This legal lacuna under international law is increasingly perceived as an obstacle to the efforts of the international community to cope in an efficient manner with the phenomenon of smuggling of illegal migrants for criminal purposes. Therefore, the action to be undertaken under the aegis of the Commission urgently needs to be complemented by the elaboration of an appropriate international instrument ensuring that perpetrators as well as instigators and accomplices of this transnational crime will be effectively brought to justice.

3. The main features of such a legal instrument could be the following:

- Establishing the smuggling of illegal migrants as a transnational crime;

- Establishing an obligation for the contracting States to render the smuggling of illegal migrants punishable under their domestic law;

- Establishing an obligation for the contracting States to provide for their jurisdiction over the abetting, assisting or otherwise participating in acts of smuggling of illegal migrants for personal profit;

- Establishing the principle of aut dedere aut judicare;

- Establishing an obligation for the contracting States to provide mutual judicial assistance;

- Establishing provisions concerning the extradition of alleged offenders;

- Establishing general principles of penal law to be observed;

- Establishing a principle of penal sanctions against the perpetrators but not the victims.

4. Bearing in mind that the smuggling of illegal migrants constitutes a very special form of transnational crime, Austria is of the opinion that the problem should be dealt with in a special convention. Therefore, Austria invites all interested Member States to participate actively in the negotiations of this convention at the seventh session of the Commission.

I would be grateful if you would have the text of the draft instrument annexed hereto circulated as an official document of the General Assembly under item 105 of the provisional agenda.

Ernst SUCHARIPA
Ambassador
Permanent Representative of Austria
to the United Nations

ANNEX

Draft international convention against the smuggling of illegal migrants

The States Parties to the present Convention,

Concerned about the threat posed by the rapid development of smuggling of illegal migrants,

Concerned that an increasing number of migrants are being smuggled for reasons of prostitution and sexual exploitation,

Convinced that the smuggling of illegal migrants is often connected with particularly heinous forms of transnational exploitation of individuals in distress,

Convinced that only a global approach to the phenomenon of illegal migration including socio-economic measures can lead to an extinction of this crime,

Desiring to conclude an effective international convention directed specifically against the smuggling of illegal migrants as a first step,

Have agreed on the following:

Article 1

Any person who intentionally procures, for his or her profit, repeatedly and in an organized manner, the illegal entry of persons into another State of which such persons are not nationals or permanent residents, commits the offence of "smuggling of illegal migrants" within the meaning of the present Convention (hereinafter called "the offence").

Article 2

Any person who attempts, or who commits an act constituting participation as an accomplice in, any such smuggling, in an attempt to commit such smuggling, or organizing or ordering others to commit such smuggling likewise commits the offence.

Article 3

For the purpose of the present Convention:

(a) "Illegal entry" means the crossing of borders without fulfilling the necessary requirements for legal entry into the receiving State; and

(b) "Profit" means any financial or other material benefit deriving from the commission of the offence.

Article 4

1. Each State Party shall make the offences enumerated in articles 1 and 2 of the present Convention punishable by appropriate penalties which take into account their grave nature.

2. Each State Party shall take the necessary measures to enable the judiciary to deprive persons committing such offences of all profit derived therefrom.

3. A person whose illegal entry is procured or intended by such smuggling shall not become punishable on account of such smuggling.

Article 5

1. Each State Party shall take legislative measures to establish its jurisdiction over the offences mentioned in articles 1 and 2 of the present Convention in the following cases:

(a) When the offence is committed in the territory of that State or on board a vessel or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the alleged offender is present in its territory and it does not extradite him or her.

2. For the purpose of this article, the illegal entry into the territory of another State Party shall be considered equal to the illegal entry into the territory of the State Party concerned.

3. The present Convention does not exclude any criminal jurisdiction exercised in accordance with domestic law.

4. If more than one State Party intends to resume jurisdiction over an alleged offender in accordance with this article, the States Parties concerned shall consider renouncing jurisdiction in order to render possible proceedings in the State Party most directly affected by the commission of the smuggling.

Article 6

Upon being satisfied that the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its domestic law to ensure his or her presence for the purpose of prosecution and extradition. Such measures shall be communicated without delay to:

(a) All States in which the offence was committed or that have been or should have been affected thereby or that have established their jurisdiction over the offence;

(b) The State of which the alleged offender is a national or, if he or she is a stateless person, in whose territory he or she permanently resides.

Article 7

The State Party in whose territory the alleged offender is present shall, if it does not extradite him or her, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with domestic law.

Article 8

1. The offences shall be deemed to be included as extraditable offences in any extradition treaty between States Parties. The States Parties undertake to include the offences as extraditable offences in every future extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it shall consider the present Convention as the legal basis for extradition in respect of those offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. The States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between them, subject to the conditions provided by the law of the requested State.

4. Each of the offences shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of the States required to establish their jurisdiction in accordance with paragraph 1 of article 4.

5. The States Parties, subject to their domestic legislation, shall consider simplifying extradition of consenting persons who waive formal extradition proceedings by allowing direct transmission of extradition requests between appropriate ministries and extraditing persons based only on warrants of arrest or judgements.

Article 9

1. The offences shall not be considered political offences for the purpose of the present Convention.

2. Extradition shall not be granted if the requested Party has substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of his or her race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

Article 10

Any person regarding whom proceedings are being carried out in connection with any of the offences shall be guaranteed fair treatment at all stages of the proceedings.

Article 11

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences, including the supply of all evidence at their disposal necessary for their proceedings.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

Article 12

1. For the purpose of examining the progress made by the States Parties in achieving the realization of the obligations undertaken in the present Convention, the States Parties will provide periodic reports to the Commission on Crime Prevention and Criminal Justice.

2. The States Parties will provide such reports within two years after the entry into force of the Convention for the State Party concerned, and thereafter every five years.

Article 13

The provisions of the present Convention shall be without prejudice to the obligations of States Parties under the Convention relating to the Status of Refugees.

Article 14

1. The present Convention is open for signature to all States until ... at United Nations Headquarters in New York.

2. The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Convention is open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 15

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twentieth instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each State ratifying or acceding to the present Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of the instrument of ratification or accession.

Article 16

1. Any State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 17

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.